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No. 86-770

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

HENRY HARRIS,

Petitioner,

vs.

MARGARET BLAKE, ELLIS COPELAND,
MICHAEL J. GIMMESTAD,
and the BOARD OF TRUSTEES
OF THE UNIVERSITY OF NORTHERN COLORADO,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.

STATEMENT OF THE CASE

Petitioner's Statement of Fact is an inaccurate rendition of the record before the lower courts who have dealt with this matter, and omits or ignores the bulk of

the undisputed facts presented to the District and Circuit Courts in this case.

Petitioner's Statement of the Case attempts to portray a student whose academic performance has been seriously criticized by the University of Northern Colorado solely because he had car trouble. In actual fact, the record below, upon which the District and Circuit Courts relied for their rulings and findings, indicates the following undisputed chronology of events.

Petitioner enrolled in a graduate program at the University of Northern Colorado under a program designated as the Center for Special and Advanced Studies (CSAP). Contrary to the Petitioner's efforts to portray this program as one not sponsored by the University of Northern Colorado, CSAP was part of the University's Department of Psychology, Counseling and Guidance. The

graduate counselling degree which Petitioner sought through this program would have been granted by the University of Northern Colorado. The instructors in the program included full-time professors of the University and, at times, visiting professors from other universities. However, the program was administered entirely by employees of the University of Northern Colorado.

The Respondents have no reason to believe that Henry Harris did not perform in a satisfactory academic manner in the classroom courses which he took toward his counselling degree, prior to the spring of 1979. However, at this point in his educational career, he was faced with the necessity of completing a course known as a Practicum in which, for the first time, he was actually required to conduct face-to-face counselling sessions with real clients. Shortly before

undertaking this Practicum which was being taught by the Respondent, Professor Blake, at the University of Northern Colorado Campus, Petitioner Harris had been given an incomplete in another course in this program being taught by Respondent, Professor Copeland.

The thrust of the Practicum was that the students obtain actual counselling experience with actual patients. The course was further designed for observation of such counselling sessions by the other students in the course through a two-way mirror for videotaping and for "feedback" to the student counselor, by the other students and instructors. Requirements for the course were that each student was to attend every class and to actively participate in the feedback sessions. Additionally, each student was responsible for obtaining tapes to record their sessions

and to locate and bring three clients for counselling.

Harris was absent on the first day of the course but attended the following four sessions. On April 2, 1979, Harris was scheduled to tape his first counseling session, but arrived at the class without having obtained a tape or a client. One of the other students agreed to allow Harris to take responsibility for the counseling of one of his clients and permission was obtained from the client for this purpose.

Harris' attempt at counseling this person was judged by all who observed it as awful. Affidavits were obtained and presented to the district judge in this matter from virtually every other graduate student who witnessed Harris' performance at this session as well as Harris' behavior at the other classes which he did attend. The following are

quotations from the affidavits of each of the other graduate students who observed Petitioner's performance in his first attempts at real life counseling:

> "Henry, from the very first class, exhibited confusion over even the most basic of counseling theory and technique that is clearly a prerequisite for someone to practice counseling with real clients. Henry was definitely not ready to practice counseling techniques. Observing Henry in a counseling session was extremely painful for me -- feeling a professional obligation to provide a service for the client. I also felt sorry for Henry's clients -- the sessions were uncomfortable for Henry, the client and the observers.
>
> . . .
>
> "I was an intern in Margaret's Practicum last spring and observed Henry's first and only counseling session. Henry appeared to not be prepared for this session. He did not seem comfortable with the client and spent much time staring at her. It was my opinion that he did not demonstrate that he had any counseling experience, even in role playing. Henry did not come to his next session and after a long discussion,

Margaret and I decided to give him a second chance. Henry did not show up for his next session, although his client did. She seemed quite upset, confused and did not want to continue until she was reassured by a new counselor that Henry would not be her counselor."

. . .

"During the time that I knew Henry, he displayed very little skill in basic communication and even less as a counselor. He made no attempt to share or be part of the weekly group and quit coming after the first or second meeting. I have worked professionally for the last eleven years and have spent the last two years counseling and administrating treatment centers. In that period of time, I have never been associated with a poorer counselor than Henry. I also feel that he disregarded his commitment to the whole group of fellow Practicum students who spent the entire quarter having to fill the gap he created."

Following this counselling session, petitioner left the class without remaining for the required - feedback session with the other students. He

never appeared for the class again. He also never met with the particular client again with the result being reflected by the above quotation from the Affidavit of another of the graduate students in this class. During the last week in the quarter during which this Practicum was being taught, Harris appeared at the University Administrative Offices and asked permission to withdraw from the class. Professor Blake was contacted, but refused to grant her permission allowing him to withdraw. Technically, Harris was in a posture to withdraw from the class and was allowed to do so by the University. As noted in her deposition and other portions of the record in this case, her opposition to Harris' withdrawal was based on her feeling that his performance should be evaluated and recorded. The withdrawal prevented Professor Blake from giving a letter

grade to Harris' performance in this Practicum.

Since Professor Blake knew that Harris' performance would go unknown to the faculty at the University, unless a record was made of Harris' academic performance, she took her concerns to the advisory committee for CSAP. This committee was made up of faculty and school representatives charged with general policy and administrative concerns in the department. While Professor Blake made her concerns very specific to the advisory committee, she maintained Harris' anonymity to this committee. On the unanimous recommendation of this committee, Professor Blake was instructed to place a letter in Harris' academic file, describing his performance in her Practicum. It is this memorandum or letter which is the subject matter of this litigation.

Contrary to Petitioner's assertions in his Statement of Fact, this letter was never disseminated outside the confines of the University of Northern Colorado. Professor Blake simply placed the letter in Harris' academic file, which file was available to all professors and administrative staff at the University.

Having been allowed to withdraw from this Practicum, Harris was allowed to take the course over again in the summer of 1979. This course was taught by a visiting professor, Dr. H. Dan Smith. Dr. Smith awarded Harris a "D" for this course. In the record presented to the District Court, it was noted that Dr. Smith had seen the Memorandum contained in Harris' academic file, but stated that this letter did not influence his decision as to the grade given Harris. Rather, his decision was based on the following quoted criteria enunciated by Dr. Smith:

> "Henry is not ready for a responsible counselling field placement; a letter of recommendation from me cannot include even such words as 'excellent', 'good', or even 'average'; and Henry displayed little insight for self-criticism or self-directed growth as the result of his class performance. Mr. Harris earned his 'D'.
>
> His bevahior certainly reflected his commitment to minimum requirements and minimum responsibility on his part. He offered little to the class in the way of involvement or willingness to attempt new counselling behaviors."

Harris had also been given a "C" in the course for which he had previously been given an incomplete by Professor Copeland. Dissatisfied with the grades given him by Copeland and Smith, Harris followed the appeals' process available to him, which is discussed at length in the decision of the Circuit Court, and which is challenged by Petitioner in this matter. Contrary to Harris' statement in his Petition, the grade awarded him by

Dr. Smith was the grade he challenged before the hearing panel of the graduate board of academic control at this University. He had not, however, appealed the "C" given him by Copeland in a timely manner and this was apparently not considered. The hearing, however, took approximately seven hours and during the hearing, Harris introduced well over 100 pages of documents into evidence. Harris was represented at this hearing by appointed academic counsel. The appeal board upheld the grade or grades in question. As a matter of procedure, a review of the record indicates that Petitioner has not heretofore challenged the due process aspect of the hearing given Petitioner before this appeal board. In any event, as reflected by the decision of the Circuit Court, Harris received not one, but several, opportunities to present his position to

responsible school officials and "the requirements of procedural due process were, therefore, satisfied".

Given the above undisputed facts which constitute the salient portion of the record presented to the District and Circuit Courts, it is abundantly clear that Petitioner's Statement of the Facts in this case is hardly accurate and largely consists of editorial and conclusory comments with respect to what actually occurred while Petitioner was at the University of Northern Colorado. The letters in question, the second of which was generated specifically at the request of Petitioner, were not circulated "within and outside the academic community of the University of Northern Colorado". The particular letter in question was not placed in the Petitioner's academic file merely because he had automobile trouble. Rather, the

facts are those as noted by the District and Circuit Courts, i.e., the letter or letters in question were academic evaluations of Petitioner's performance in a class. Further, based on the above portions of the record, and as specifically found by the District Court, Professor Blake's actions with respect to the Petitioner were not "clearly arbitrary and capricious". To attempt to characterize the actions of the University and Professor Blake as "disciplinary" is simply to avoid the obvious and appears to be an effort by Petitioner to use this Petition as a method of asking this Court to overturn factual decisions based upon an undisputed record which have previously been made by the District and Circuit Courts below.

It is also important to note in this statement of the case that the District

Court in granting summary judgment noted that summary judgment was merited independently by this Court's ruling in Harlow v. Fitzgerald, 457 U.S. 800 (1982). The District Court specifically noted that Petitioner's theories of relief under 42 U.S.C. §1983 did not involve clearly established violations of constitutional rights. Petitioner's counsel was asked to advise the District Court of case authority from any federal jurisdiction which would support his civil rights theories in this case. None were given because none existed. Therefore, as an additional and independent ground for granting summary judgment, in addition to those which are addressed in the Tenth Circuit decision in this case, summary judgment was entirely appropriate under the rationale of this Court in Harlow.

REASONS FOR NOT ALLOWING THIS WRIT

Petitioner's basis for seeking this Writ seems primarily directed toward a request that this Court overturn factual findings made by the lower District and Circuit Courts upon undisputed portions of the record. Petitioner's stated reasons for seeking this Writ include none of the criteria contained in Rule 17 of the Rules of this Court. The arguments presented this Court by Petitioner obviously include no contention that the Circuit decision in this case is in conflict with the decision of another federal court of appeals. Likewise, Petitioner does not contend that the Tenth Circuit has decided an important question of federal law which has not been settled by this Court, or that the Circuit has decided a federal question in a way in conflict with prior decisions of this Court.

Rather, it appears clear, as noted by the Tenth Circuit that Petitioner claims the Respondents "misjudged Harris' fitness to remain a student". As noted by the Circuit Court, the record clearly does not support any "substantial departure from accepted academic norms" under the particular circumstances of this case. As was the case in Regents of the University of Michigan v. Ewing, ____ U.S. ____, 106 S.Ct. 507 (1985), the Petitioner in this matter received consideration of his case at virtually every academic and administrative level at the University of Northern Colorado.

As this Court noted in Ewing, under these circumstances, judges must show great respect for a university faculty's professional judgment. In the instant case, both the District and Circuit Courts found the actions of the Respondents to be based upon academic

concerns and clearly not arbitrary or capricious. As to this aspect of the matter, the Petition presented in this instance does not merit review by this Court since it involves a highly appropriate decision of the District and Circuit Courts below.

At the risk of being redundant, it must also be noted that summary judgment was appropriate in this case under the dictates of this Court in Harlow v. Fitzgerald. The allegations concerning Petitioners' civil rights, as presented to the District Court, simply did not and do not, even as of this date, involve a violation of clearly-established constitutional law.

CONCLUSION

This Petition for a Writ of Certiorari is basically a request that this Court sit as a trier of fact on those facts already determined by lower

courts. The Petitioner in this case is simply dissatisfied with the evaluation given his performance in an obviously academic context. To elevate this matter to the dignity of a case which should be addressed by the United States Supreme Court would be highly improper. This Petition neither involves the criteria required by Rule 17 of this Court nor a case in which error has been committed by either of the lower courts involved. Under any circumstance, Professor Blake's evaluation of Petitioner's performance in her class clearly does not involve a clearly-established constitutional right. For these reasons, the Respondents respectfully pray that this Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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